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MODIFICATION AND DISCHARGE OF RESTRICTIVE COVENANTS: THE HOUSING ACT 1985

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Entirely unnecessarily, the court further considered whether there was any general public policy principle not to enforce the Iranian law. It decided that there was not, indeed there are positive reasons of comity to enforce the cultural heritage provisions of foreign states, at [154]. But the idea that choice of law is grounded in comity is challengeable. In addition, this dangerous aside entirely misinterprets the role of public policy in conflict of laws. Where the applicable law determines the result, public policy has a negative (not positive) effect and only in the rarest of cases. Otherwise, the courts will be tempted into investigating the content of the foreign law, and refusing to apply law it dislikes. That would undermine the foundations of choice of law.

These cultural heritage cases remain uncertain. They will turn on the drafting of the original law and its unpredictable interpretation by English courts. Also, facts which are merely coincidental become critical; such as whether in law or fact the state was in possession of the artefact, who now is in possession and who is making or defending the claim. The many international instruments seem to lack real effect as none was relevant to this appeal. Property cases need clear rules, those who have acquired the artefacts should be able to predict the outcome and international art thieves must be discouraged. The judgment has done little to clear the muddy waters.

PIPPA ROGERSON

MODIFICATION AND DISCHARGE OF RESTRICTIVE COVENANTS: THE HOUSING
ACT 1985

IN *Lawntown Ltd. v. Camenzuli* [2007] EWCA Civ 949, [2008] 1 All E.R. 446, the Court of Appeal provided the first guidance on the exercise of the county court's discretion under section 610 of the Housing Act 1985 to modify or discharge restrictive covenants. This discretion is distinct from the analogous and more familiar power of the Lands Tribunal under section 84 of the Law of Property Act 1925, as amended.

The Camenzulis owned one of a pair of semi-detached houses in London on an estate of similar properties; all were originally intended to be single dwellings. Both their home and the adjoining property, bought by Lawntown Ltd., a property development company, were subject to restrictive covenants prohibiting conversion of the houses into flats. Lawntown began work converting their property into flats only to face objections from the Camenzulis on two grounds: no

planning permission had been granted for the alterations; and, the property was burdened by covenants prohibiting the conversion.

So far, so normal. In an era of growing pressure on housing stocks, such disputes between developers and neighbours are frequent, particularly given the prevalence of restrictive covenants prohibiting development. The Land Registry estimates that 79 per cent. of existing registered freehold titles, or some 13 million, are subject to restrictive covenants of some description. Such covenants are not merely relics of an historical heyday following the decision in *Tulk v. Moxhay* (1848) 2 Ph. 774, since approximately 270,000–300,000 new restrictive covenants were registered against freehold titles each year in the period 2003–2005 (Law Commission Consultation Paper No. 186, *Easements, Covenants and Profits à Prendre* (2008)).

Restrictive covenants appeal to a particularly human desire to control and prevent “unacceptable” uses of land. They are prized for their ability to impose particularly individualistic and localised fetters over the use of land, *e.g.* preventing development, restricting use and controlling the appearance, size of buildings and the density of occupation. There is a tension between these private land use controls and the statutory public controls of planning and environmental law. Each regime has a “distinctive and fundamentally different *raison d’être*” with covenants “geared to the protection of private property rights” whilst planning law looks to the “public interest and good” (D.L. Sabey and A.R. Everton, *The Restrictive Covenant in the Control of Land Use* (Aldershot 1999), pp. 3–4).

The relationship between the two systems is often fraught. In *Lawntown* itself the conversion was delayed by covenants, not the planning permission process. The developer could have applied to the Lands Tribunal to modify or discharge the covenant on one of the four familiar statutory grounds contained in section 84, namely: that the property’s or neighbourhood’s changed character or other circumstances render the covenant obsolete; that reasonable use is impeded *and* the covenant provides no practical benefit, or is contrary to the public interest and, in either case, money would be adequate compensation for any loss; that the parties involved have expressly or impliedly agreed to the modification or discharge of the covenant; or finally, that those benefiting from the covenant would not be injured by the order sought.

However, *Lawntown* chose to take a different route by applying to the county court under section 610. This neglected statutory provision is a boon for those seeking to avoid the consequences of restrictive covenants limiting development. Whilst the scope of section 610 is narrower than that of section 84, applying as it does *only* to covenants requiring properties to remain as single dwellings, it is much easier to

satisfy. Section 610 allows a local housing authority or a “person interested in a house” to apply to the court for relief where, under subsections (1)(a) and (b) respectively, either: due to changes in the “character of the neighbourhood” the house in question “cannot readily” be let as a single dwelling, but could be let if it comprised two or more dwellings; or, where planning permission has been granted for the conversion of a house from a single dwelling to two or more dwellings but this is “prohibited or restricted by the provisions of the lease of the house, or by a restrictive covenant affecting the house, or otherwise”. Agreeing with the judge at first instance, the Court of Appeal held that section 610 and section 84 were “plainly intended” to be separate regimes, but that matters pertinent to a section 84 application might be relevant under section 610 as well.

In deciding to discharge the covenant, the Court of Appeal stressed the importance of carrying out a “balancing exercise” when considering the interests protected by the restrictive covenant, and the public or private advantages resulting from the variation. On the facts of *Lawntown*, Richards L.J. held that the Camenzulis’ concerns about the appearance of the property, density of occupation, and alleged diminution of property values were not of great weight. Preserving the character of the neighbourhood, and the fear that an adverse precedent might be set, were however valid and more compelling concerns. Conversely, the developer wished to alter its property, and had subsequently been granted planning permission after careful scrutiny by the local planning authority despite the Camenzulis’ objections. As with section 84, however, there was no statutory presumption under the Housing Act 1985 that restrictive covenants *should* be varied when planning permission had been granted (see *Re Martin’s Application* (1988) 57 P. & C.R. 119).

The most significant and weighty factor which tipped the balance “decisively” in favour of *Lawntown* was the “urgent demand for more housing in London”. Planning policies setting ambitious housing targets reflect matters of wider public interest; it was “legitimate and appropriate” for the court to have regard to the “public benefit” of meeting the need for additional homes “through conversion of existing houses into flats”. The Court of Appeal agreed with the judge at first instance that its discretion to vary the terms of a covenant “subject to such conditions and terms as the court may think just” allowed for compensation to be provided. However, on the facts this was inappropriate, since there was no evidence that loss had been suffered.

Lawntown suggests that in this “small and crowded island” facilitating the conversion and redevelopment of property for the wider public benefit will trump private controls on land use. Section 610, rather than section 84, is likely to become an ever more valuable

tool for developers seeking to avoid such restrictive covenants; it seems that for once, the grass really *is* greener on the other side.

EMMA WARING

DISCLOSURE OF A SETTLOR'S WISH LETTER IN A DISCRETIONARY TRUST

IN *Breakspear v. Ackland* [2008] EWHC 220 (Ch) Briggs J. ordered that a "wish letter", written by the settlor to the trustees of a discretionary settlement, should be disclosed to the trust beneficiaries. The beneficiaries had applied to the court to challenge the trustees' refusal to disclose the letter, and to invoke the court's inherent supervisory jurisdiction to order disclosure of it. There was at that stage no question of any contentious proceedings between the parties so the beneficiaries could not seek disclosure and inspection of the letter, along with any other relevant documents in the trustees' control, under Part 31 of the Civil Procedure Rules. The trustees intended, however, to wind up the trust a few years later and to apply to the court at that stage to sanction a scheme for distributing the trust assets to the beneficiaries. The contents of the settlor's wish letter would become directly relevant to that application.

Briggs J. held that the need to avoid re-considering whether the letter should be disclosed at that later stage justified an order for disclosure of it in the proceedings before him. But without that exceptional fact he would have treated the settlor's letter as confidential to the trustees. It was not enough to justify letting the beneficiaries see the letter that they wanted to plan their lives and were interested to know how the settlor might have wanted the trustees to exercise their dispositive powers in the future.

Wish letters are a common feature of modern discretionary settlements. A settlor often confers broad dispositive discretions upon the trustees. There may be nothing on the face of the trust instrument to indicate what purposes the settlor had in mind in creating the trust; which of the beneficiaries he actually wanted to benefit from the exercise of the trustees' dispositive powers; and in what order of priority they should benefit. The wish letter is a non-binding guidance from the settlor to the trustee. It indicates what things the trustees should take into account in exercising their discretions. In reality, it is likely to inform the reasons for the exercise of the trustees' appointments of capital and income to the beneficiaries. Most beneficiaries would be curious, at the very least, to know what it says.

The significance of *Breakspear* is that it holds that the trustees and the court are generally justified in keeping the wish letter confidential